

# Decision Notice



Decision 053/2010 Mrs June Quinn and Dumfries and Galloway Council

Report regarding a complaint

Reference No: 200901561  
Decision Date: 30 March 2010

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mrs June Quinn requested from Dumfries and Galloway Council (the Council) information pertaining to a complaint that she had made against a named police officer. The Council withheld the information under a number of exemptions in Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which the Council additionally relied upon section 38(1)(b) of FOISA to withhold the information, Mrs Quinn remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council additionally relied upon section 38(1)(a) of FOISA. Following an investigation, the Commissioner found that the Council had dealt with Mrs Quinn's request for information in accordance with Part 1 of FOISA, by withholding the report under sections 38(1)(a) and 38(1)(b) of FOISA. He did not require the Council to take any action.

## Relevant statutory provisions and other sources

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e) (Effect of exemptions); 38(1)(a), (b), (2)(a)(i) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data: condition 6)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

---

1. On 4 June 2009, Mrs Quinn wrote to the Council regarding complaints she had made against a named police officer in 2002. The complaint had been considered by a Council committee, and the committee had decided, in January 2003, that no further action would be taken in relation to the complaint.



2. In her letter of 4 June 2009, Mrs Quinn requested a copy of the decision, a report prepared by the Council's Head of Legal Services (the report) and any other information regarding her complaint.
3. The Council responded on 6 July 2009, withholding the requested information in terms of the exemptions in sections 26(a), 30(b)(ii), 30(c) and 36(1) of FOISA.
4. On 13 July 2009, Mrs Quinn wrote to the Council requesting a review of its decision. In particular, Mrs Quinn drew the Council's attention to legislation (section 3 of the Police Act 1964) which she believed indicated that the information she had requested should be made public. She also maintained that in order for a complainant to appeal against of a decision of the type made in her case, they should be given a copy of all the information connected with the decision.
5. The Council notified Mrs Quinn of the outcome of its review on 11 August 2009. The Council upheld its previous decision and in addition relied upon section 38(1)(b) (in conjunction with 38(2)(a)(i)) of FOISA to withhold the requested information. The Council also advised Mrs Quinn that the Police Act 1964 applied to England and Wales only, and so her comments regarding its provisions had no relevance to this case.
6. On 1 September 2009, Mrs Quinn wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mrs Quinn had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

---

8. On 4 September 2009, the Council was notified in writing that an application had been received from Mrs Quinn and was asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, asking it to confirm that it had identified all the information that fell within the scope of Mrs Quinn's request, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



10. In response, the Council identified an additional two files of information that fell within the scope of Mrs Quinn's request. The Council withdrew its reliance upon the exemptions in sections 26(a) and 30(b) of FOISA, but, in addition to the exemptions previously cited, also relied upon section 38(1)(a) of FOISA to withhold the information. The Council provided submissions to support its decision to withhold the requested information under sections 30(c), 36(1), 38(1)(a) and 38(1)(b) of FOISA.
11. During the course of the investigation, Mrs Quinn accepted that much of the information under consideration was her own personal data and as such should be sought in terms of her subject access rights under the DPA. As a result, most of the information falling within the scope of Mrs Quinn's request will not be considered in this decision.
12. However, Mrs Quinn indicated that she wanted the Commissioner's decision to consider whether she should have access to the report, which she did not consider to be personal data, and in disclosure of which she considered there to be a significant public interest.
13. Mrs Quinn also provided comments to inform the Commissioner's consideration of the public interest test associated with sections 30(c) and 36(1) of FOISA and on her legitimate interests in the information to inform his consideration of the exemption in section 38(1)(b) of FOISA.

### **Commissioner's analysis and findings**

---

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mrs Quinn and the Council and is satisfied that no matter of relevance has been overlooked.
15. The information under consideration in this case is the report (and its associated appendices), which details the complaints made by Mrs Quinn about the named police officer, the preliminary investigation undertaken in response to these by the Council's Head of Legal Services, and his conclusions and recommendations. This report was considered by a Council committee, which made the decision (which was communicated to Mrs Quinn) that no further action would be taken.
16. In its submissions, the Council explained the process to be followed following receipt of complaints of this type. The Head of Legal Services will conduct a preliminary investigation through contact with the complainant only. The purpose of the Head of Legal Services' report is to enable the Committee to decide if there is sufficient evidence to refer or appoint an investigating officer to carry out a full investigation of the complaint. The Council noted that, during this process, the person being complained about is not informed of the complaint and is not allowed to attend any meeting of the Committee or submit comments.



### **Personal data – section 38(1)(a) of FOISA**

17. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data where it is the personal data of the applicant. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a subject access request) under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to information about themselves. Therefore, the effect of the exemption in section 38(1)(a) of FOISA is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the DPA and not under FOISA.
18. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
19. The report in this case includes details of Mrs Quinn's complaint, commentary on each of the points she had raised and copies of correspondence between her and the Council regarding her complaint. The Commissioner is satisfied that almost all of the information within the report relates to Mrs Quinn, and that she can be identified from this information (and other information in the possession of the Council).
20. Insofar as the information withheld relates to Mrs Quinn's complaint, the Commissioner considers this information to be entirely her own personal data, and so is exempt from disclosure in terms of section 38(1)(a) of FOISA.
21. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider whether the public interest lies in the information being released or withheld.

### **Personal data – section 38(1)(b) of FOISA**

22. The Council has also withheld information in the report under section 38(1)(b) of FOISA, stating that the sections of the report which are not Mrs Quinn's personal data, are the personal data of a third party (the person against whom Mrs Quinn's complaint was made), disclosure of which is exempt under FOISA.
23. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) (or, where appropriate, (b)) exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
24. The Commissioner must first, therefore, consider whether the information under consideration is the personal data of the person against whom Mrs Quinn's complaint was made. As noted above, personal data is defined in section 1(1) of the DPA and the full definition is set out in the Appendix to this decision.



25. The Commissioner accepts that much of the withheld information in the report relates to that third party, describing a complaint made about their conduct, the preliminary investigations undertaken to establish whether the complaint warranted further investigation, and the recommendations made by the Council's Head of Legal Services in relation to this complaint. The police officer concerned can be identified from information contained in the report and other information held by the Council.
26. The Commissioner is therefore satisfied that the majority of the withheld information in this case is (as well as being Mrs Quinn's personal data) personal data of the police officer.
27. The Commissioner must consider whether disclosure of this personal data would contravene the first data protection principle, as argued by the Council.

#### **Would disclosure contravene the first data protection principle?**

28. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met, and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met.
29. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data in this case does not fall into this category. It is therefore not necessary to consider the conditions in Schedule 3 of the DPA in this case.
30. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition in the schedules which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
31. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of the information would be fair and lawful.

#### **Can any of the conditions in Schedule 2 of the DPA be met?**

32. The Commissioner considers that only condition 6(1) of Schedule 2 of the DPA might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed into the public domain in response to Mrs Quinn's information request) if disclosure of the data is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
33. There are a number of tests which must be met before condition 6(1) can apply:



- Does Mrs Quinn have a legitimate interest in being given this personal data?
  - If so, is the disclosure necessary to achieve those legitimate aims? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject (in this case, the police officer about whom Mrs Quinn's complained)?
  - Even if disclosure is necessary for the legitimate purposes of the applicant, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject? This will involve a balancing exercise between the legitimate interests of Mrs Quinn and those of the police officer. Only if the legitimate interests of Mrs Quinn outweigh those of the police officer can the personal data be disclosed.
34. In its correspondence with the investigating officer, the Council stated that it considered that condition 6(1) of Schedule 2 of the DPA was the only one which might apply, but, having balanced Mrs Quinn's legitimate interest in the report against the rights of the legitimate interests of police officer, concluded that disclosure of the information would be unwarranted.

*Does Mrs Quinn have a legitimate interest?*

35. Mrs Quinn was invited to provide her reasons for requiring the information to inform the Commissioner's consideration of condition 6(1). Mrs Quinn explained that as she raised the complaint she has a clear interest in obtaining the information on the basis that the complaint involves her. She indicated that she should have access to the information in order to ensure that it had been dealt with appropriately and in a fair and just manner.
36. The Commissioner accepts that Mrs Quinn has a legitimate interest in obtaining the report, given that this relates to her complaint and would allow her to consider whether it had been considered thoroughly and appropriately.

*Is disclosure of the information necessary to achieve those legitimate interests?*

37. The Commissioner has also considered whether disclosure of the information would be necessary to achieve Mrs Quinn's legitimate aims, and concluded that, given the nature of the information requested and the circumstances of the case, there was no other way of obtaining details as to why the complaint decision was reached. It is noted that Mrs Quinn was advised of the outcome of her complaint, but was not provided with any details as to the Council's consideration of the points raised in her complaint.



*Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?*

38. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subject (the police officer). As noted above, this involves a balancing exercise between the legitimate interests of Mrs Quinn and the individual in question. Only if the legitimate interests of Mrs Quinn outweigh those of the police officer can the information be disclosed without breaching the first data protection principle.
39. In the Commissioner's briefing on section 38 of FOISA<sup>1</sup>, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- a. whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances).
  - b. the potential harm or distress that may be caused by the disclosure.
  - c. whether the individual has objected to the disclosure
  - d. the reasonable expectations of the individuals as to whether the information would be disclosed.
40. The Commissioner has noted that, during the investigation, the Council sought the comments of the police officer, who indicated that they did not want the details of the complaint to be disclosed.
41. The Commissioner has also noted that the police officer was not informed of the complaint or afforded the opportunity to respond during the preliminary investigation. He also notes that the Council committee's decision following that preliminary investigation was that the complaint was unfounded and no further investigation was required.
42. In the circumstances, the Commissioner considers it reasonable that the individual concerned would not expect information detailing the complaint made against them to be made available in response to a request for information under FOISA. He also accepts that disclosure of the personal data of the police officer contained in the report into the public domain (which would be the effect of a disclosure under FOISA) would constitute an intrusion into the private life of that person.
43. Having balanced the legitimate interests of the police officer against the legitimate interests identified by Mrs Quinn, and taking account of the police officer's legitimate expectation of privacy where allegations of misconduct were made and ultimately considered to be unfounded, the Commissioner has found that disclosure would be unwarranted in this case. Accordingly, the Commissioner is satisfied that condition 6 of Schedule 2 of the DPA is not met in relation to this individual.

<sup>1</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=133>





44. For the same reasons, the Commissioner has concluded that disclosure would be unfair and, in breaching the first data protection principle, unlawful. Accordingly, the Commissioner finds that the Council was correct to withhold the personal data of the police officer under section 38(1)(b) of FOISA.

### **Conclusion**

45. The Commissioner finds that the Council was entitled to withhold all of the information contained in the report requested by Mrs Quinn in terms section 38(1)(a) of FOISA insofar as it is the personal data of Mrs Quinn and in terms of section 38(1)(b) of FOISA insofar as it is the personal data of the police officer in question.

### **DECISION**

The Commissioner finds that Dumfries and Galloway Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mrs June Quinn. The Commissioner does not require the Council to take any action.

### **Appeal**

---

Should either Mrs June Quinn or the Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**30 March 2010**



## Appendix

---

### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –
  - (i) paragraphs (a), (c) and (d); and
  - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



### 38 Personal information

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;
  - (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- ...
- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles; or
- ...
- ...
- (5) In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
- "data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;
- ...



## Data Protection Act 1998

### 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

## Schedule 1 – The data protection principles

### Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

### Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...